

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OCT - 5 2005

JAMES R. LARSEN, CLERK
DEPUTY
YAKIMA, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KELLY R KNEIFEL,)
) NO. CV-04-00310-AAM
Plaintiff,)
v.)
) ORDER **GRANTING** DEFENDANT'S MOTION
JO ANNE B BARNHART,) FOR SUMMARY JUDGMENT, *INTER ALIA*
Commissioner of Social)
Security,)
Defendant.)

BEFORE THE COURT are cross motions for Summary Judgment. (Ct. Rec. 13, 17). Attorney Maureen Rosette represents the Plaintiff; Assistant United States Attorney Pamela Derusha and Special Assistant United States Attorney Franco L. Becia represent the Defendant. After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's motion for summary judgment and **GRANTS** Defendant's motion for summary judgment.

I. JURISDICTION

Kelly R. Kneifel (Plaintiff) filed for Disability Insurance benefits and Supplemental Security Income on October 2 and October 23, 2001. (Tr. 64-66; 364-67). She alleged a disability of depression, with an onset date of January 31, 2000. (Tr. 64, 80, 393). Her application was denied initially and upon reconsideration. (Tr. 34,

**ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT, *INTER ALIA* -1-**

40). She timely requested a hearing before an administrative law judge (ALJ). (Tr. 43). The hearing took place on March 18, 2003, before ALJ Mary Bennett Reed. (Tr. 389-449). ALJ Reed denied Plaintiff's claims for benefits on October 21, 2003. (Tr. 16-30). The Appeals Council denied review, making the ALJ's decision the final decision of the Commissioner. (Tr. 7). The instant matter is before the district court pursuant to 42 U.S.C. § 405(g).

II. SEQUENTIAL EVALUATION

The Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a claimant shall be determined to be under a disability only if her impairments are of such severity that the claimant is not only unable to do her previous work but cannot, considering claimant's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987):

Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If she is, benefits are denied. If she is not, the decision maker proceeds to step two.

Step 2: Does the claimant have a medically severe impairment or combination of impairments? 20 C.F.R. §§ 404.1520(a)(4)(ii),

1 416.920(a)(4)(ii)). If the claimant does not have a severe impairment
2 or combination of impairments, the disability claim is denied. If the
impairment is severe, the evaluation proceeds to the third step.

3 Step 3: Does the claimant's impairment meet or equal one of the
4 listed impairments acknowledged by the Commissioner to be so severe as
to preclude substantial gainful activity? 20 C.F.R. §§
5 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P,
App. 1. If the impairment meets or equals one of the listed
6 impairments, the claimant is conclusively presumed to be disabled. If
the impairment is not one conclusively presumed to be disabling, the
7 evaluation proceeds to the fourth step.

8 Step 4: Does the impairment prevent the claimant from performing
work she has performed in the past? 20 C.F.R. §§404.1520(a)(4)(iv),
9 416.920(a)(4)(iv). At this step, the claimant's residual functional
capacity assessment is considered. If the claimant is able to perform
10 her previous work, she is not disabled. If the claimant cannot
perform her previous work, then the evaluation proceeds to the fifth
11 and final step.

12 Step 5: Is the claimant able to perform other work in the
national economy in view of her age, education, work experience and
13 residual functional capacity? 20 C.F.R. §§ 404.1520(a)(4)(v),
416.920(a)(4)(v).

14
15 The initial burden of proof rests upon the claimant to establish
16 a prima facie case of entitlement to disability benefits. *Rhinehart*
17 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). This burden is met once
18 a claimant establishes that a physical or mental impairment prevents
19 her from engaging in her previous occupation. At step five, the
20 burden shifts to the Commissioner to show that (1) the claimant can
21 perform other substantial gainful activity; and (2) a "significant
22 number of jobs exist in the national economy" which claimant can
23 perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

24 III. STANDARD OF REVIEW

25 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001) the
26 court set out the standard of review:

27 A district court's order upholding the Commissioner's
28

1 denial of benefits is reviewed de novo. *Harman v. Apfel*, 211
2 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
3 Commissioner may be reversed only if it is not supported by
4 substantial evidence or if it is based on legal error.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
6 Substantial evidence is defined as being more than a mere
7 scintilla, but less than a preponderance. *Id.* at 1098. Put
8 another way, substantial evidence is such relevant evidence
9 as a reasonable mind might accept as adequate to support a
10 conclusion. *Richardson v. Perales*, 402 U.S. 389, 401
11 (1971). If the evidence is susceptible to more than one
12 rational interpretation, the court may not substitute its
13 judgment for that of the Commissioner. *Tackett*, 180 F.3d at
14 1097; *Morgan v. Commissioner of Social. Sec. Admin.*, 169
15 F.3d 595, 599 (9th Cir. 1999).

16 The ALJ is responsible for determining credibility,
17 resolving conflicts in medical testimony, and resolving
18 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
19 Cir. 1995). The ALJ's determinations of law are reviewed de
20 novo, although deference is owed to a reasonable
21 construction of the applicable statutes. *McNatt v. Apfel*,
22 201 F.3d 1084, 1087 (9th Cir. 2000).

23 IV. STATEMENT OF THE CASE

24 Plaintiff was 45 years old at the time of the hearing. She had
25 finished 11th grade and completed her GED. (Tr. 417). She was single
26 and has one adult son. *Id.* She was a heroin addict for 20 years,
27 using one to two grams per day. (Tr. 393). When she did not have a
28 job, she supported her habit by selling heroin. (Tr. 394). She
testified her last use was the end of June 2000. (Tr. 393). At the
time of the hearing, she was in her third year of methadone treatment.
(Tr. 423). She was also taking Zoloft for depression and Trazadone
for sleep problems. (Tr. 335).

Plaintiff has worked as a customer service representative, a
legal secretary, a secretary and cashier. (Tr. 97). She was a live-
in caretaker for her grandmother for almost three years until her
grandmother's death in April 2001. (Tr. 97, 419-20).

In October 2002, Plaintiff was hit by a truck while riding her

bicycle and sustained serious injuries to her right leg and left knee that required surgery. (Tr. 428-29). She testified that since the accident she cannot walk the block from her house to the bus stop. (Tr. 430). At the time of the hearing, her boyfriend was providing her transportation. (Tr. 436). Regarding her daily activities, Plaintiff testified she was attending classes at Spokane Community College three hours per day, that she could study only for a half hour at a time before she had to stop and take a nap. She stated she slept "all the time." (Tr. 426-28). She testified her boyfriend did most of the housework and chores. (Tr. 437).

Medical expert Allen Bostwick, Ph. D., and vocational expert Deborah Lapoint also testified. (Tr. 390).

V. ADMINISTRATIVE DECISION

At step one, ALJ Reed found Plaintiff was a heroin addict until she went into treatment in June 2000. (Tr. 17). She found Plaintiff's drug dealing to support her habit until mid-June 2000 constituted substantial gainful activity (Tr. 17); therefore, Plaintiff did not satisfy the first step of the sequential evaluation process before June 2000. (Tr. 23). She found Plaintiff's work-related activities in caring for her grandmother did not constitute substantial gainful activity, but did indicate an ability to work. (Tr. 18).

At step two, adopting the opinions of Dr. Bostwick, the ALJ found Plaintiff's heroin addiction, which caused "moderate" and "marked" restrictions in Plaintiff's ability to work, met the requirements of the Listings until she became abstinent in June 2000. (Tr. 23). Citing Public Law 104-121, the ALJ determined Plaintiff's heroin

1 addiction was material to a determination of disability up to that
2 time; further, because Plaintiff was engaged in substantial gainful
3 activity until June 2000, she was ineligible for Social Security
4 benefits. (Tr. 23).

5 The ALJ found that after Plaintiff entered treatment and stopped
6 using heroin, Plaintiff had "severe" impairments due to limitations
7 from her bicycle accident and dysthymia; however, these impairments
8 did not meet or equal the Listings. (Tr. 23). She found that
9 following substance abuse treatment, Plaintiff's dysthymia caused only
10 mild limitations. *Id.* At step four, the ALJ found that before
11 Plaintiff's bicycle accident in October 2002, she retained the
12 residual functional capacity for the full range of physical exertion,
13 but was limited to jobs where her attention and concentration would be
14 allowed to lapse intermittently. (Tr. 29). As such, she retained the
15 ability to perform her past relevant work as a general clerk and
16 cashier. *Id.* The ALJ found Plaintiff's subjective complaints about
17 her functional limitations, especially before her accident, were not
18 entirely credible. (Tr. 24).

19 The ALJ determined that after October 2002, Plaintiff was unable
20 to perform any of her past relevant work and had the residual
21 functional capacity to perform a limited range of light/sedentary work
22 with the above-noted mental limitations. (Tr. 29). She was limited to
23 lifting and carrying no more than 20 pounds occasionally and 10 pounds
24 frequently; standing and walking no more than 15-20 minutes at a time
25 for no more than one hour of an eight hour day; no more than seldom
26 pushing/pulling with her lower extremities; no work environment with
27 exposure to hazardous machinery or unprotected heights, no extremes in
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1 temperature or humidity; never climbing, kneeling, crouching,
2 crawling, stooping, and no more than occasional balancing.
3 (Tr. 25-26).

4 Using the Grids as a framework and considering Ms. Lapoint's
5 testimony, the ALJ found Plaintiff had transferrable skills and could
6 perform a significant range of sedentary work, such as call out
7 operator, general clerk, clerk typist, insurance clerk and circulation
8 clerk. (Tr. 27-28). Accordingly, she found Plaintiff "not disabled"
9 as defined in the Social Security Act.

10 VI. ISSUES

11 The question presented is whether the ALJ's decision is supported
12 by substantial evidence and is free of legal error. Plaintiff argues
13 that the ALJ erred when she: (1) improperly evaluated the medical
14 evidence in determining the severity of her mental impairment; (2)
15 relied on the testimony of a non-examining medical expert; and (3)
16 improperly rejected the opinions of her examining psychologists. (Ct.
17 Rec. 14, p. 10-12). Plaintiff further contends the post-hearing
18 evaluation by Dennis Pollack, Ph.D., should be considered in the
19 court's review. She argues that the new evidence constitutes a basis
20 for reversal of the ALJ's decision. (Ct. Rec. 14, p. 14).

21 VII. DISCUSSION

22 A. Evaluation of Medical Evidence

23 In a disability proceeding, a treating or examining physician's
24 opinion is given more weight than that of a reviewing or non-examining
25 physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004);
26 *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001) (quoting
27 *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)); *Lester v.*

1 *Chater*, 81 F.3d 821, 830 (9th Cir. 1996); *Smolen v. Chater*, 80 F.3d
2 1273, 1285-88 (9th Cir. 1996); *Flaten v. Secretary of Health and Human*
3 *Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995); *Fair v. Bowen*, 885 F.2d
4 597, 604-05 (9th Cir. 1989). If an examining physician's opinions are
5 not contradicted, they can be rejected only with "clear and
6 convincing" reasons. *Lester*, 81 F.3d at 830. If contradicted, the ALJ
7 may reject the opinion if specific, legitimate reasons that are
8 supported by substantial evidence are given. See *Flaten*, 44 F.3d at
9 1463; *Fair*, 885 F.2d at 605. To meet this burden, the ALJ can set out
10 a detailed and thorough summary of the facts and conflicting clinical
11 evidence, state his or her interpretation of the evidence, and make
12 findings. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002),
13 citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

14 Here, the ALJ set forth a detailed summary of Plaintiff's medical
15 treatment from the time she entered substance abuse treatment. (Tr.
16 18-23). Her summary is supported by the record.

17 A heroin addict for more than 20 years, Plaintiff entered
18 drug/alcohol treatment at Olalla Recovery Center on June 15, 2000,
19 where she successfully completed a 21 day program. (Tr. 267). She
20 participated in the recommended outpatient program until September
21 2000, when she was discharged for non-compliance after testing
22 positive for opiates. (Tr. 274). In October 2000, the Division of
23 Vocational Rehabilitation (DVR) referred Plaintiff to John McRae,
24 Ph.D, for a psychological assessment and diagnostic report. (Tr. 136).
25 Dr. McRae conducted a mental status exam, a Beck Depression Inventory
26 and Anxiety Inventory, a Wechsler Abbreviated Intelligence Scale WAIS)
27 and memory scale (WMS-III), and a Minnesota Multi-phasic Personality
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1 Inventory (MMPI), the results of which were determined valid. (Tr.
2 137-39). He concluded Plaintiff suffered from recurrent major
3 depression without psychotic features, opioid dependency in early full
4 remission, and a personality disorder, nos. (Tr. 139). He gave her a
5 Global Assessment of Functioning (GAF) score of 50 for the past year
6 and a current score of 45.¹ Dr. McRae opined that in her present
7 state, she could not maintain work tasks, but her depression could be
8 treated with anti-depressants effectively. He estimated she would be
9 in a more functional state within three to six months. (Tr. 140). He
10 opined her mental abilities and learning abilities were adequate, and
11 she could profit from education, training or employment. *Id.* In the
12 evaluation form, Dr. McRae indicated a "marked" degree of severity for
13 the following symptoms: depressed mood, social withdrawal, motor
14 retardation, and global illness. (Tr. 142). He indicated "severe"
15 limitations in her ability to perform routine tasks and "marked"
16 limitations in her ability to respond appropriately to and tolerate
17 pressures of a normal work setting. (Tr. 143).

18 On March 16, 2001, mental health professional Darcie Smiley,
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20 ¹ The GAF scale is a common tool for tracking and evaluating the
21 overall psychological functioning of a patient. A score of 41-50
22 indicates "severe symptoms (e.g. suicidal ideation, severe obsessional
23 rituals, frequent shoplifting) OR any serious impairment in social,
24 occupational or school functioning (e.g., no friends, unable to keep a
25 job)." A score of 51-60 indicates "moderate symptoms (e.g., flat
26 affect and circumstantial speech, occasional panic attacks) OR
27 moderate difficulty in social, occupational, or school functioning
28 (e.g., few friends, conflicts with peers or co-workers)." A score of
61-70 indicates "some mild symptoms, (e.g., depressed mood and mild
insomnia) OR some difficulty in social, occupational, or school
functioning (e.g., occasional truancy, or theft within the household),
but generally functioning pretty well, has some meaningful
interpersonal relationships." *Diagnostic and Statistical Manual of
Mental Disorders, Fourth Edition (DSM-IV)*, at 32 (1995).

1 M.S., completed a psychological/psychiatric evaluation form.² (Tr.
2 145-48). She assessed "marked" limitations in Plaintiff's ability to
3 (1) relate appropriately to co-workers and supervisors; (2) interact
4 appropriately with the public; and (3) tolerate the pressures and
5 expectations of a normal work setting (social factors). (Tr. 147).
6 As noted by the ALJ, Ms. Smiley³ referred to objective test results,
7 but supporting documentation is not in the record. (Tr. 19-20).

8 Plaintiff was referred to Dr. Rosekrans to evaluate her need for
9 continued financial assistance. (Tr. 149, 178). Dr. Rosekrans
10 completed a psychological evaluation on September 12, 2001, apparently
11 based on Plaintiff's self-report. (Tr. 149-50). He concluded she was
12 suffering from an adjustment disorder due to her divorce, drug
13 withdrawal and abstinence. (Tr. 150). He reported her conversation
14 was normal, she was pleasant, cooperative and able to do her
15 activities of daily living. (Tr. 149). He opined it would take her
16 another six months before trying to do full-time work. *Id.* Dr.
17 Rosekrans diagnosed Plaintiff with adjustment disorder with mixed
18 anxiety and depressed mood and opioid dependence, sustained full
19 remission. He assessed "marked" limitations in her ability to relate
20 appropriately to co-workers, supervisors, and to the public, and in
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22 ² The opinions of Ms. Smiley, who is not an acceptable medical
23 source, are to be considered by the ALJ to the extent they assess the
24 effects of an impairment on a claimant's ability to work. 20 C.F.R. §§
25 404.1513(a), (d)(1). Her opinions regarding diagnoses are not
26 considered those of an acceptable medical source and are, thus, given
27 less weight than that of examining and non-examining physicians. See
28 *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996).

³ The court observes the ALJ inadvertently referred to Ms. Smiley
here as Ms. "Smith." (Tr. 19). It is clear from the entire record
that the medical provider being discussed was Darcie Smiley.

1 her ability tolerate the pressures and expectations of a normal work
2 setting. (Tr. 153). The record does not include clinical notes or
3 test results from Dr. Rosekrans.

4 At the hearing, Dr. Bostwick testified that Plaintiff's cognitive
5 abilities were well within the normal limits, even when tested shortly
6 after her withdrawal from heroin. (Tr. 400, 405). This is consistent
7 with the results of Dr. McRae's objective testing in October 2000.
8 (Tr. 138-39). Dr. Bostwick also noted Plaintiff exhibited antisocial
9 behavior when she was using drugs, i.e. embezzling from her employer,
10 which could be the basis for Dr. McRae's finding of a personality
11 disorder. Dr. Bostwick noted that this diagnosis was isolated and
12 without specifics. (Tr. 402). He opined her depression initially was
13 more severe, but did not persist for 12 months. He also noted no
14 history of mental health treatment other than medication. (Tr. 400).
15 He based his opinions on a longitudinal review of the entire record,
16 including counseling notes from Ramona Sherman, ARNP. (Tr. 23; 399).
17 Dr. Bostwick concluded Plaintiff's diagnosis at the time of the
18 hearing was depressive disorder that did not meet the criteria of a
19 severe mental impairment. (Tr. 402). He testified that Plaintiff's
20 dysthymia was controlled with medication. The ALJ adopted his finding
21 that during times of situational exacerbation, Plaintiff was subject
22 to moderate limitations in "maintaining attention and concentration
23 for extended periods of up to no more than ten per cent of the time."
24 (Tr. 22, 410). He found that none of the limitations noted in the
25 record met the "12 month durational period of the Act." (Tr. 411).

26 Plaintiff argues that the ALJ did not properly reject the
27 opinions of her examining psychologists when she relied upon Dr.

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1 Bostwick's testimony. (Ct. Rec. 14, p. 12). The ALJ is responsible
2 for resolving conflicts and ambiguities in the evidence. *Sample v.*
3 *Schweiker*, 694 F. 2d 639, 642 (9th Cir. 1982). The analysis and
4 opinion of an expert selected by an ALJ may be helpful in her
5 adjudication and resolution of conflicting medical testimony.
6 *Andrews*, 53 F.3d at 1041, citing *Magallanes*, 881 F.2d at 753. Courts
7 have upheld an ALJ's decision to reject the opinion of an examining
8 physician based, in part, on the testimony of a non-examining medical
9 advisor. See *Tonapetyan v. Halter*, 242 F.3d 1144, 1148-49 (9th Cir.
10 2001); *Lester*, 81 F.3d at 831. Testimony of a medical expert may
11 serve as substantial evidence when supported by other evidence in the
12 record. *Magallanes*, 881 F.2d at 752. A reviewing court may not
13 second guess the ALJ if the evidence rationally supports his or her
14 determination. *Andrews*, 53 F.3d at 1039-40. If supported by
15 substantial evidence, the ALJ's decision must be upheld, even where
16 the evidence is susceptible to more than one rational interpretation.
17 *Id.*

18 In her evaluation of the medical evidence, the ALJ should set
19 forth specific reasons for the weight given to all acceptable medical
20 source opinions. *Id.* at 1042. If the ALJ rejects a contradicted
21 medical opinion, she must give specific, legitimate reasons for doing
22 so. However, the court does not require a "special incantation" in
23 the rejection of medical opinions. Rather, the reviewing court may
24 draw specific and legitimate inferences from the ALJ's summary of the
25 evidence, interpretation and findings, as long as they are supported
26 by substantial evidence in the record. *Magallanes*, 881 F.2d at 755.
27 Historically, courts have recognized internal inconsistencies,

1 conflicting medical evidence, the absence of regular medical treatment
2 during the alleged period of disability, and the lack of medical
3 support for doctors' reports based substantially on a claimant's
4 subjective complaints as specific, legitimate reasons for disregarding
5 an examining physician's opinion. *Thomas*, 278 F. 3d at 957; see also
6 *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 605. Further, the more
7 consistent an opinion is with the record as a whole, the more weight
8 is given to that opinion. 20 C.F.R. §404.1527(d)(4). The ALJ does
9 not need to accept the opinion of any medical source if it is
10 conclusory, brief or unsupported by findings. *Matney on Behalf of*
11 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992).

12 As summarized and interpreted by the ALJ, the medical evidence
13 reveals specific and legitimate inferences that support the ALJ's
14 rejection of the findings of Dr. McRae, Dr. Rosekrans and Ms. Smiley
15 that Plaintiff had severe social limitations. (Tr. 21-22, 24, 26).
16 Most notably, the treatment notes from Nurse Sherman show Plaintiff's
17 depression improved significantly with medication, that Plaintiff
18 participated in volunteer activities, and denied fatigue, mood swings
19 or problems with attention or concentration. (Tr. 21-22, 166, 186,
20 229, 235). Plaintiff reported positive experiences with friends and
21 school. (Tr. 170, 238, 241). She was able to live independently,
22 attend group meetings and perform her daily activities without
23 significant problems. (Tr. 229-30). Nurse Sherman's observations
24 over the years and her contemporaneous notes support Dr. Bostwick's
25 opinions that any depression was situational and did not meet the
26 durational requirement.

27 The ALJ also made specific findings rejecting the medical
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1 opinions at issue. She found "no supporting documentation or
2 objective testing to support the assessment of severe social
3 limitations." (Tr. 26). She determined that the severe social
4 limitations findings were not consistent with the record as a whole,
5 were not consistent with Dr. McRae's opinion that Plaintiff's
6 condition would be resolved in three to six months, and were based on
7 unreliable self-report. *Id.* The ALJ stated that Plaintiff's contact
8 with other medical providers did not indicate "significant social
9 interaction difficulties and treatment notes indicate that she had
10 friends, was volunteering, going to school, and attending a variety of
11 group meetings." *Id.* These are legitimate reasons for rejecting a
12 medical opinion, and are supported by substantial evidence in the
13 record. See *Thomas*, 278 F.3d at 957.

14 Plaintiff argues that the record shows that, contrary to the
15 ALJ's finding, Dr. McRae conducted many objective tests, and
16 therefore, the ALJ's rejection of Dr. McRae's opinion was legal error.
17 (Ct. Rec. 14, p. 13). This argument is without merit. Although Dr.
18 McRae administered objective tests, the test results do not reveal a
19 basis for the conclusion that Plaintiff had severe limitations in the
20 designated social factors. There are no clinical notes from Dr. McRae
21 to support a finding of "marked" or "severe" social limitations.
22 Further, the form entries regarding social factors are conclusory and
23 internally inconsistent.⁴ (Tr. 143). As Dr. McRae stated in his

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25 ⁴ The court notes that there are conflicting degrees of
26 limitation checked for several of the categories under Social Factors
27 and a notation, "could deal [with] stress or use judgment." (Tr.
28 143). These inconsistencies necessarily detract from the weight given
to the evidence. 20 C.F.R. § 404.1527(c)(2), (4); see also *Morgan*,
169 F.3d at 603.

1 narrative, Plaintiff had just withdrawn from heroin, and although she
2 was not in a functional state to work at the time of the evaluation,
3 he expected her to improve with medication and counseling. (Tr. 140).
4 Dr. McRae also reported that objective testing placed her in the
5 moderate range of depression, and that despite her depression, she was
6 able to concentrate and remember information. (Tr. 139).

7 In support of her findings, the ALJ also pointed out that
8 Plaintiff cared for her grandmother full-time, until April 2001.
9 Plaintiff reported that this involved cooking, shopping, daily
10 household chores and providing companionship to her grandmother. (Tr.
11 18, 98, 420). It was reasonable for the ALJ to reject the "marked"
12 and "severe" limitations from this evaluation form in light of its
13 inconsistency with the psychologist's narrative, the lack of
14 supporting documentation, and the record in its entirety. 20 C.F.R. §
15 404.1527(c)(2).

16 The ALJ properly found that Ms. Smiley's and Dr. Rosekrans'
17 evaluations were not supported by documented test results or clinical
18 notes. (Tr. 22). Dr. Rosekrans' evaluation is based primarily on
19 Plaintiff's self-report which the ALJ found unreliable, a finding that
20 has not been challenged. The ALJ further found Dr. Rosekrans' report
21 was not consistent with Ms. Sherman's notes. (Tr. 26). The ALJ noted
22 that Dr. Rosekrans' observations in September 2001, that Plaintiff was
23 pleasant and cooperative contradicted his conclusion of "marked
24 severity in her ability to interact with the public." (Tr. 20, 149,
25 153). She stated there was no evidence of problems in prior work
26 settings, other than theft while Plaintiff was using heroin. (Tr. 22).
27 The ALJ's specific and legitimate reasons are sufficient basis for
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1 rejection of the opinions at issue.

2 The record in its entirety supports the ALJ's reliance on Dr.
3 Bostwick's opinions and her ultimate decision that Plaintiff's
4 impairments caused mild restrictions in her ability to work. The ALJ
5 did not err in her evaluation of the medical evidence.

6 B. New Evidence

7 On October 29, 2003, subsequent to the ALJ hearing and decision,
8 Plaintiff was evaluated by Dennis Pollack, Ph. D. (Tr. 378-83).
9 Plaintiff submitted this evaluation to the Appeals Council. The
10 Appeals Council considered the new evidence and found that the
11 information did not provide a basis for changing the ALJ's decision.
12 (Tr. 8). Plaintiff argues Dr. Pollack's findings reflect impairments
13 more severe than those found by the ALJ. (Ct. Rec. 14, p. 14). She
14 contends this evidence merits a remand to the ALJ for further
15 proceedings. *Id.*

16 In this circuit, when the Appeals Council specifically considers
17 new evidence in the context of denying the claimant's request for
18 review, the reviewing court considers the rulings of both the ALJ and
19 the Appeals Council, and the record includes the ALJ's decision as
20 well as the new evidence. *Gomez*, 74 F.3d at 971; *Ramirez v. Shalala*,
21 8 F.3d 1449, 1452 (9th Cir. 1993).

22 Dr. Pollack's evaluation consisted of a review of Plaintiff's
23 medical reports, including psychological evaluations from Drs. McRae
24 and Rosekrans. (Tr. 378). He administered the WAIS-III, the MMPI-2,
25 and conducted a personal interview. *Id.* Plaintiff reported attending
26 Spokane Community College since 2000, with a grade point average of
27 2.6. (Tr. 379). Plaintiff reported she changed medications from
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1 Zoloft to Celexa to Effexor.⁵ (Tr. 380). She reported doing various
2 household chores; however, she stated she did not visit with friends
3 or relatives and was not involved in volunteer work. (Tr. 381).

4 Dr. Pollack diagnosed her with major depression (recurrent,
5 without psychotic features), opioid dependence in remission, and
6 personality disorder (dependent and antisocial features). (Tr. 383).
7 He noted the MMPI-2 scores indicates "she may have been exaggerating
8 her difficulties or she was being honest [sic] about her presentation
9 of self," but the scores were "not so high as to invalidate the
10 testing." (Tr. 382). Intelligence tests placed her in the average
11 range, and the MMPI-2 profile was that of a "very anxious and
12 depressed" individual. (Tr. 383). In his Medical Source Statement
13 (Mental), Dr. Pollack opined Plaintiff had "moderate" limitations⁶ in
14 her ability to (1) maintain attention and concentration for extended
15 periods; (2) perform activities within a schedule, maintain regular
16 attendance and be punctual; (3) accept instruction and respond
17 appropriately to supervisors; and (4) get along with co-workers. He
18 found a "marked" limitation in her ability to complete a normal
19 workday or workweek. (Tr. 384-85). He opined Plaintiff had "slight"
20 limitations in her ability to perform at a consistent pace and
21

22
23 ⁵ According to Nurse Sherman, Plaintiff discontinued anti-
24 depressants in mid-October 2002. She resumed medication treatment in
25 December 2002, and by March 2003, had increased her Zoloft dosage to
26 150 mgs. (Tr. 280, 335). Plaintiff did not submit new evidence
documenting her medication history between March 2003 and October 29,
2003.

27 ⁶ The Medical Source Statement defines "moderate" limitation, as
28 "still able to function satisfactorily," and "marked" limitation, as
"ability to function severely limited but not precluded." (Tr. 384).

1 interact appropriately with the public. *Id.*

2 When considering new evidence as a basis for remand, the
3 reviewing court must determine if the evidence is material and there
4 is good cause for the late submission. 42 U.S.C. § 405(g); see also
5 *Mayes v. Massanari*, 276 F.3d 453, 462 (9th Cir. 2001); *Bruton v.*
6 *Massanari*, 268 F.3d 824, 827 (9th Cir. 1984) (new evidence is material
7 if it "bears directly and substantially on the matter in dispute;" and
8 "there is a reasonable possibility" it would change the outcome of the
9 ALJ's decision). Based on this standard, the court declines to
10 remand. The new evidence presented does not differ significantly from
11 evidence in the record before the ALJ. Further, the opinions are
12 conclusory with no supporting documentation, and are based partially
13 on Plaintiff's subjective allegations of functional limitations which
14 were found not fully credible.

15 In arguing materiality, Plaintiff contends that Dr. Pollack's
16 evaluation establishes her limitations are more severe than those
17 found by the ALJ. (Ct. Rec. 14, p. 14). Contrary to Plaintiff's
18 argument, Dr. Pollack found only "slight" limitations in her ability
19 to interact with the public, and "moderate" limitations in her ability
20 to get along with co-workers and accept instruction from supervisors,
21 indicating some improvement. (Tr. 385; cf. Tr. 153). He found a
22 "marked" limitation in her ability to "complete a normal workday or
23 workweek." (Tr. 384). However, there is no explanation for this
24 limitation, and the objective testing was inconclusive due to possible
25 exaggeration. (Tr. 382, 384). Further, there is no evidence to show
26 that Plaintiff met the durational requirement, or was following
27 through with recommended antidepressant and methadone treatment. See
28

1 Fair, 885 F.2d at 603 (failure to follow treatment recommendations
2 negatively impacts credibility). The new evidence does not establish
3 a reasonable possibility that the opinions therein would change the
4 outcome of the ALJ's determination; therefore, remand is not
5 appropriate.

6 **VIII. CONCLUSION**

7 The ALJ properly rejected the examining psychologists' opinions
8 that Plaintiff had severe social limitations. The ALJ's reliance on
9 Dr. Bostwick's testimony was not legal error. His opinions, and the
10 ALJ's ultimate findings, are supported by substantial evidence in the
11 entire record. The psychological evaluation submitted after the ALJ's
12 decision is conclusory, without supporting documentation, and does not
13 indicate a worsening in Plaintiff's condition. Consequently, there is
14 no reasonable possibility that it would change the outcome of the
15 ALJ's determination. Accordingly,

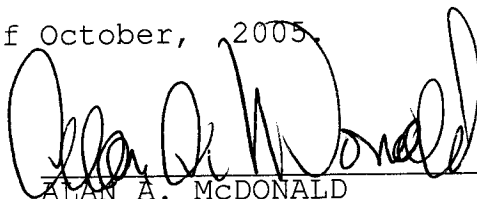
16 **IT IS ORDERED:**

17 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
18 **DENIED.**

19 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is
20 **GRANTED.**

21 3. Judgment for the **DEFENDANT** shall be entered. The District
22 Court Executive is directed to enter this Order, forward copies to
23 counsel, and thereafter shall close this file.

24 **DATED** this 5th day of October, 2005.

25 
26 _____

27 ALAN A. McDONALD
28 SENIOR UNITED STATES DISTRICT JUDGE